1. Introduction

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Globalisation is a phenomenon that has become pervasive in a world in which national boundaries are continually crossed by movement of people, goods, services, communication, among others. As the global sphere becomes more traversed, the dimensions of the global system become all the more important to understand, particularly in the face of the evolution of international economic law and growing global economic integration. This book aims to analyse the legal and economic issues confronting the global economic system and contribute to a better understanding of the law and economics of globalisation in the twenty-first century.

The volume comprises a collection of papers by economists, lawyers, and other experts who critically assess key aspects of globalisation through examining the emerging issues and challenges from the viewpoint of their respective discipline. The chapters highlight the legal and economic challenges confronting the global system, including issues lying at the intersection of fields. Each article with its own and sometimes interdisciplinary lens will add to the overall cross-disciplinary argument by stressing how the challenges in the global system arise from the unique nature of international law as well as stem from the reach of globalisation into areas previously thought to be national concerns, including legal development, economic growth, and institutional structures. How the challenges are addressed will influence the development of the norms, institutions and scale of the global system.

International economic laws and rules, though they have always existed, take on a formal institutional form of the World Trade Organization (WTO) established in 1995. The WTO was created as a product of the Uruguay Round of multilateral trade negotiations and supersedes the previous General Agreement on Tariffs and Trade (GATT) which had governed much of the post-war period. By July 2008, it counts 153 member countries, accounting for the near totality of world trade. Member countries have different terms of accession, but all subscribe to the principle of non-discrimination in trade arrangements among other members that characterises the spirit of the multilateral trading system. Although the coverage of the WTO is limited and a new round of trade liberalisation talks was
launched within a decade of its inception in 2001 (the Doha Round), there are several notable traits of the WTO that herald an era of international economic laws, rules, and enforcement. The rollback of the WTO would mark a reversion away from a rules-based global trade system where even powerful countries submit to the WTO dispute adjudication procedures to one that is again dominated by the bargaining power of nations, which would necessarily disadvantage poorer and borrower nations.

The WTO and the other main economic supra-national organisations – the Bretton Woods institutions of the World Bank and the International Monetary Fund (IMF) – play a notable role in shaping economic globalisation as well as governance and economic growth. The United Nations constitutes another significant set of supra-national organisations, some of which are geared at economic development, for example, United Nations Industrial Development Organisation (UNIDO), but are less pertinent to global economic governance as compared with the Bretton Woods institutions and the WTO. Other notable international financial institutions (IFI) include the Bank for International Settlements (BIS) and regional ones such as the Asian Development Bank. Notably, the ‘Washington Consensus’, which referred to the stance taken by the World Bank and IMF, emphasised a belief in free markets which held sway particularly in the 1980s and 1990s and governed the economic policies and choices of many developing countries. This approach dictated the tenor of the poverty alleviation projects and liquidity provided by these institutions to developing countries, which came under much criticism during the financial crises experienced in the late 1990s. Likewise, the trade liberalisation principle embodied by the WTO had a direct effect on the policies and even laws of member countries. However, the WTO was felt to not have benefited developing countries as much as rich ones, which culminated in the Doha Round becoming known as the ‘development round’ whose remit was to even out the gains from globalisation. As global bodies, the implementation of their policies is necessarily at the national level. As such, the effects of the global economic system range from influencing legal reforms and governance arrangements, to the economic growth and development paths of affected countries – usually developing ones. The influence of the international organisations is undeniable. International economic laws, regulations and rules, therefore, are a key facet of globalisation as are the policies promulgated by the IFIs, particularly for developing countries. The challenges confronting international economic law matters significantly for economic development as countries increasingly rely on the global economy as a source of growth.

Indeed, the law and economics literature focuses on the economic analysis of laws, which has understandably emphasised the impact of domestic
laws given the later and more recent development of international economic law. However, the potentially significant effect of international economic rules warrants a similar investigation. Therefore, the economic analysis of international economic law forms part of the mandate of this volume, extending the law and economics literature from the analysis of the economic impact of domestic laws to one encompassing international laws of growing importance as global integration proceeds apace in the twenty-first century.

How globalisation evolves and its ultimate sustainability will be related to not only the economic but also legal challenges faced, at both the international and domestic levels. Many of the chapters highlight the multilayered legal system at the international, regional and national levels. The development of the international economic system will depend on its integration into these various levels and an appreciation of the resultant political and economic ramifications. Likewise, international trade and economic growth policies will also require a multilayered approach that factors in the implications of this evolving system of economic governance.

This volume covers the cutting edge issues in law and economics in the realm of globalisation, and its findings and recommendations for reform hold implications for the development of the global system at a time when the world is increasingly inter-connected but still feeling its way around the strictures and gaps in international laws and the supra-national institutions. The book is divided into three sections. The first focuses on the challenges confronting international economic law, the WTO and global trade; the second on issues arising in governance and enforcement; while the third shifts to evaluating globalisation and economic growth in such a global system.

In the first section, the chapter by Cottier queries the bases for the legitimacy of WTO law. The expansion of international economic regulations culminating in the WTO created new legal foundations, including a dispute resolution mechanism, that has attracted criticism. He outlines the bases for questioning the legitimacy of the WTO, particularly in terms of the effects on developing countries, which were similar to the criticisms levied at the Bretton Woods institutions and the Washington Consensus. The complaint centres on the WTO not achieving its goal of promoting shared prosperity, but rather that its laws do not offer adequate differentiation between rich and poor countries which has caused objections to arise in both developed and developing countries. Procedurally, there are also objections raised regarding a lack of democratic legitimacy of the WTO, such as WTO law encroaching upon other domestic regulatory fields not sufficiently represented in trade negotiations and the imbalance in which
the system is tilted toward large trading partners who have the resources and expertise to negotiate and impose sanctions where authorised. The result is a call for limiting the WTO to its existing boundaries and the refusal of courts to grant direct effect to WTO law, including the United States and European Union. Cottier compellingly argues that the problems of legitimacy are in many ways a result of the stance taken by WTO members, who have the prerogative, and indeed should aim, to address and reform the system of international governance which is layered upon the domestic system in the globalised economy. Petersmann’s contribution further examines this issue and seeks to address the constitutional problems of national and intergovernmental economic governance. By situating the constitutional arguments in the context of the criticisms of the WTO by poor countries, Petersmann also argues for a shift from the paradigm of ‘member-driven governance’ in the WTO to one that defines development as individual freedom, consumer-driven competition and autonomous development of human capacities that is protected by constitutional rights which limit the abuse of power at national and international levels. By so doing, he effectively establishes that multi-level market governance requires multi-level constitutionalism and that international economic law should promote freedom, rule of law and peaceful international cooperation for the benefit of citizens.

The next two chapters in this section shift from the legal perspective to a cross-disciplinary one and a view derived from international political economy to add to the picture of WTO law and global trade. The fifth chapter continues the discussion regarding the governance of the WTO, but from the interdisciplinary perspective of a lawyer and an economist. Dawar and Holmes examine the imbalance in the institutional structure of the WTO that has arisen as a result of the strength of the dispute settlement mechanism which has been successful while the political decision-making capacity of the WTO has experienced paralysis. The WTO and its dispute settlement body (DSB) have encouraged a number of criticisms, though. These include allowing trade law to override other economic and social priorities; developing case law when member states have not explicitly agreed the issue; and downplaying the focus on trade liberalisation that should be the core of the WTO mandate. They argue that the DSB has responded to the criticism by becoming more textual in its interpretations, but is struggling to remain within its mandates due to the gaps in parts of the trade agreements. By drawing on comparisons with the EU supra-national system, Dawar and Holmes persuasively argue for further politically-oriented institutional reform of the WTO so that the success of the DSB does not presage its failure. In this vein, the next chapter by Sally attempts to make sense of trade policy developments and liberalisation in
the new century. He examines the attacks on the Washington Consensus, reviews the record on trade and financial liberalisation particularly in the developing world, and proposes a framework for multi-track trade policy that proceeds, often simultaneously, on unilateral, bilateral, regional and multilateral bases. In the context of a criticised global system, this political economy approach that draws on past lessons elegantly manoeuvres the multi-level global system. And, it could thus define how trade policies are likely to be formulated in the future.

The first section therefore examines the foundations of international economic law, particularly the WTO and the evolution of global trade policy, while raising several issues at the frontier of this subject. The legitimacy, constitutional structure, and governance of the WTO and the implications for global trade are investigated. Importantly, reforms are proposed to secure better foundations for the legality of the global economic system.

The second section of the book proceeds to examine issues confronting governance and enforcement resulting from the global system, particularly for developing economies. First, Dreher sets out the expansion in IMF and World Bank conditionality since the 1960s from an economic perspective. Conditionality refers to policies that are prescribed for developing countries receiving assistance from these global organisations. He argues that the expansion in conditionality follows from the accelerating globalisation in the past four decades, and leads to the globalisation of economic policies which exceeds the mandate of these bodies. It is particularly so when the policies are derived from the dominant shareholders of these institutions, which are western economies and most often applied to developing and transition countries.

By interesting contrast, the economists, Bonaglia, de Macedo and Bussolo, argue that globalisation causes improved governance, but not through the explicit prescriptions of the global economic institutions. Using a large cross-section of countries over 20 years, they show that increased openness to international trade and global integration positively affects the quality of domestic institutions. They find that global integration leads to less corruption in the domestic economy – an important dimension of the globalisation and governance nexus. The mechanisms for this effect are trade policy, sensitivity of international investors to corruption, and openness-related differences in the costs of institution building. This important argument connects the global system indirectly to the domestic institutions that explicit policies have attempted to influence. In other words, whereas the policies and prescriptions of the supra-national organisations have not always been successful in reforming domestic institutions, the process of globalisation itself leads to improvements in
domestic institutional quality as countries vie to be competitive and take advantage of the benefits of the global economy. The final chapter in this section is by Bird who takes a legal perspective on the issue of the influence of international economic law on domestic systems. In particular, he examines the enforcement of intellectual property rights (IPRs) in the so-called major emerging economies – the BRICs: Brazil, Russia, India and China. He shows that despite the strong international law governing IPRs, weak enforcement in these significant developing countries holds lessons for enforcing international economic law in a global economy. Bird demonstrates the weakness of coercion and instead proposes several alternative methods based on the policies, politics and legal systems of the BRICs. He is a proponent of a role for multinational corporations themselves to adopt strategies minimising imitation, improving the incentives for domestic companies in those economies to promote IPRs, and capitalising on the specific elements of the legal culture to increase protection of IPRs. The overall lesson is that coercion does not improve enforcement at the national level. Similar to the economists’ perspective, it is not the direct prescriptions that give rise to effective enforcement of international economic law either. Understanding the situation of particular countries and sometimes the indirect effects of international norms would be more relevant in fashioning policies.

The third section of the volume tackles this point head on. Three chapters by economists evaluate different key aspects of the global economy and the ultimate sustainability of globalisation in the present system. The editor, an economist and lawyer, concludes the volume by examining the economic effects of international economic law on the growth prospects of the global economy. The contributors identify the salient, cutting edge issues to be considered in assessing the state of the global economy and the likely course and consequences of globalisation.

Chamberlin starts off the section with a compelling look at one of the tough challenges for evaluating the global economy and the sustainability of its growth prospects, namely, the issues concerning the measurement of economic activity in a globalised world. He identifies two components of what has been termed ‘dark matter,’ that is, the measurement of intangibles and the influence of globalisation on the trade of those intangibles. For example, a big puzzle has been why US direct investment overseas has a much higher rate of return than foreign direct investment in the US itself. Is it because US firms not only purchase physical capital, but transfer their superior in-house software, R&D blueprints, organisational know-how and management acumen, and so on to their foreign affiliates? If these intangible exports (referred to as dark matter because they are not seen except through their impact on investment incomes) were measured,
then the US external position may actually be more sustainable than conventionally thought. Using the experiences of the US economy, the chapter discusses the importance and validity of these issues and concludes that once understood, these issues can be tackled and an accurate picture formed as to the prospects of an evolving global economy.

Kaplinsky’s chapter questions the sustainability of globalisation in light of four factors which have the potential to disrupt its progress, as was the case at the end of the nineteenth century. First, the disruptive potential of China and India; second, the environmental sustainability of continued globalisation; third, the insecurity of the logistical arteries of globalisation; and fourth, the countervailing political forces unleashed by growing inequality across the globe. He effectively outlines the causes and consequences of these forces unleashed by the very success of expanding globalisation, but concludes that just as nineteenth-century internationalism could not proceed without disruption, it is unlikely that ever-deepening globalisation in the twenty-first century could do so. In a similar vein, Intriligator sets out his vision as to what economic globalisation entails. He then evaluates the potential benefits and costs of globalisation, but also considers the ways in which international cooperation and global institutions could better work to address those costs and challenges. He believes that there are both positive and negative aspects to globalisation; that the positive features derive from the increased competition across borders, but also that there are negative aspects such as growing inequality that can lead to conflict. Intriligator concludes that it is reform or creation of new global institutions which foster international cooperation which can redress the downsides of globalisation and ensure its progress. The economists’ viewpoint therefore brings the volume back full circle to the start of the book where the lawyers sought ways in which to strengthen the institutions and bases of international economic law to secure the continued trajectory of globalisation.

The volume is then concluded by Yueh, who evaluates the effects of international economic law on economic growth in the globalising world. She sets out the ways in which law affects the models of economic growth undertaken by countries, particularly developing ones, and assesses the evidence of economic development in the current rules-based global system. Yueh highlights the effect on two factors thought to be crucial for long-run economic growth: technological progress and institutions. She analyses the direct and indirect effects of international law on technological advancement and institutional development, and assesses the limitations of such laws and also the way in which globalisation encourages the voluntary adoption of rules governing global markets. She concludes that one of the most significant benefits of globalisation is the imposition of a
rules-based global system that has the potential to level the playing field for developing countries attempting to gain from operating in the global economy. International economic law can also promote legal reforms, allowing developing countries to not only leapfrog technologically but also in terms of institutional development. This process, however, is fraught with challenges, particularly if informal institutional arrangements centred on trust and social capital are overlooked. An area which warrants continual examination is the cost of technology transfers, which have a direct impact on economic growth and which has become governed by international economic law. Globalisation has benefited the global economy in numerous ways, and the role of international economic law has the potential to transform the operation and prospects of the global economy in this new century.

By drawing on legal and economic concepts and utilising the experience of developed countries like the US and regional groupings such as the EU as well as the lessons from the BRICs and other developing countries, this volume has presented the cutting edge issues confronting globalisation and the global economy. The different and cross-disciplinary lenses of the contributors have together wrought a volume that highlights the overlapping issues in this area and the benefits of viewing the global economic system from a range of perspectives. The foundations of international economic law rely on an evolving appreciation of economic processes, while the continuation of global economic prosperity in turn increasingly depends on the global rules-based system. It appears that globalisation, therefore, can be better understood by utilising a law and economic analysis. This volume provides a start to the process of assessing the new challenges confronting a globalising world in flux.